



## 2-28.1 General

[Standard spec 107.1](#) requires that the contractor must at all times observe and comply with all federal and state laws, administrative rules, local laws, ordinances, and regulations that affect the conduct of the work in any manner. The contractor must also comply with all orders, decrees, bodies, or tribunals having jurisdiction or authority over the work. The contractor must pay attention to the possible existence of laws and regulations that may govern construction, both on and off highway right of way. [Standard spec 107.3](#) requires the contractor to procure all permits and licenses, and comply with their requirements whether the permit is issued to the contractor, the state, or the maintaining authority. These contractual provisions do not bind the regulatory authority (e.g. DNR, EPA) that will prosecute the department if the contractor acts outside a permit or fails to obtain required permits. As a general rule, laws, rules, ordinances, and regulations are not reiterated in the standard specifications or contract special provisions. Occasionally there will be a contract special provision or specification related to noise restrictions, night work, weekend work, DNR permits and requirements, Corps of Engineers requirements, or OSHA requirements. These have been included for good reasons that may or may not be apparent and should be considered exceptions. It remains the responsibility of the contractor to research laws or regulations governing the contractor's work, although the department should verify that it is done.

[Standard spec 107.1](#) does not intend or require the engineer to exercise police enforcement power, but if the contractor is observed violating a law or regulation of which the engineer is aware, the matter is to be brought to the contractor's attention, requesting compliance with the law. Where flagrant violations affecting the work are observed, the engineer has the authority to halt operations and ensure compliance before allowing work to proceed.

## 2-28.2 Local Regulations and Permits

Department staff and consultants must consider both legal obligations and contractual requirements to determine whether they will require contractors to comply with local regulations and permits. It is important to distinguish between the legal authority WisDOT is granted in the statutes, and the contractual requirements that WisDOT places on its contractors. Furthermore it is important to note that the statutes and our contracts do not exempt the department from any federal laws and permit requirements. From a legal perspective, the statutes give the department the latitude not to comply with most local permits for work done on highway right of way. However, the department has not generally passed this latitude on to contractors. Contractually, [standard spec 107.1](#) and [standard spec 107.3](#) require contractors to comply with local regulations and permits, unless the department decides to waive them.

The statutes indicate and courts have upheld that the department is not subject to local permit requirements for work done on highway right of way, unless the statute creating the permit authority specifically says that the state is included. However, borrow pits, aggregate pits, quarries, or any other work not on highway right of way are subject to local zoning ordinances and permits, unless the statute creating the permit authority specifically says that the state is exempt.

The department has the legal authority to waive local regulations and permits for our contractors in those situations where the department is not required to comply. While the department has this authority, we use it only as needed for unique circumstances. Again, contractors have a contractual obligation as required in [standard spec 107.1](#) and [standard spec 107.3](#) to comply with local regulations and permits, unless the department waives them.

During the design phase, the department will coordinate with local officials on their regulations and permits; and in most cases, reach consensus to either enforce or waive them. Generally, the department will waive local regulations and permits in the project special provisions. For example, the department can require the contractor to comply with a local noise ordinance, as stated in [standard spec 107.1](#) and [standard spec 107.3](#), or the department can waive the noise ordinance by special provision if the contractor needs to work at night.

As a general rule, engineers should not waive local regulations or permits during construction that have not been coordinated with local officials and waived in the special provisions. However, in unique situations, the department has used its legal authority to waive local requirements during construction. Region staff may contact the WisDOT Office of General Counsel for advice on a particular situation. Engineers must document their coordination with local officials and any decisions to waive local requirements. Examples of situations where engineers have waived local regulations and permits during construction:

- A local requirement the department wasn't informed of during design that is detrimental to the project.
- Local government charging excessive fees for permits. In some cases, the department waived the fees, and still

required the contractor to comply with the terms of the permit.

Figure 1, below, is a standard letter that WisDOT staff and consultants can use to waive local regulations and permits. Print letter on region letterhead for signature by the engineer.

**Figure 1 Sample Letter to Locals to Waive Local Regulations and Permits**

Date:

Dear Local Authorities:

This letter is to notify the local unit of government that as a policy the State and its agencies are not required to comply with local regulations or pay permit fees when carrying out state governmental functions. This would include all contractors performing work on Wisconsin Department of Transportation (WisDOT) construction projects. The courts have upheld this policy several times and have used the following statutes as reference:

**86.07(3), Stats.**, reads: The prohibitions in this section, referring to 86.07(2) permit authority; do not apply to highway authorities in the performance of their duties.

**13.48(13), Stats.**, reads in part: "[E]very building, structure or facility that is constructed for the benefit of or use of the state or any state agency, board, commission or department ... But the construction is not subject to the ordinances or regulations of the municipality in which the construction takes place except zoning ..."

**13.48(10), Stats.**, specifically exempts state highway construction from the terms of the entire section. Subsection (10) reads in part: "This section applies to the department of transportation only in respect to buildings, structures and facilities to be used for administrative or operating functions"

The above quoted use of the word "section" must be read to apply to all sec. 13.48, Stats., rather than only to subsection (10) [**See sec. 990.001(5), Stats.**, regarding statutory references.]

**Section 84.01, Stats.**, gives right of entry to enter private lands to make surveys or inspections to carry out the Services required by a Contract.

WisDOT contract specifications provide the contractor with information regarding compliance with local regulations. Hopefully, the contract reflects the coordination with the local authorities made during the planning and development of the project. If necessary, WisDOT can revise the contract to waive a local regulation or permit. The WisDOT engineer can answer any questions the local authority may have and provide a copy of the contract special provisions if needed.

Sincerely,

Engineer

### 2-28.3 Conformance to Standards

The department intends that its contracts will conform to applicable state, national, and industry standards. However, the engineer's primary responsibility is to ensure compliance with contract requirements and standards pertinent to the contract. Whenever there is a conflict between standards required by the contract and other standards, the contract standards will be followed provided sound engineering practice is not violated.

## 2-28.4 Preference for US-Made Materials

[Standard spec 106.2.2](#) refers to Wisconsin Statute 16.754 which requires the contractor to furnish materials manufactured to the greatest extent in the United States, when all other factors are substantially equal unless the contract provides otherwise. This statute applies to all materials used on WisDOT projects and is completely independent from the federal Buy America provision covering iron and steel products.

## 2-28.5 Buy America Provision

If a single design or construction contract within the scope of a National Environmental Protection Act (NEPA) document is awarded using federal-aid funding, Buy America provisions apply to all contracts within the scope of that NEPA document. Almost all WisDOT construction contracts are subject to the Buy America requirements, but it is difficult to determine if a particular contract is covered. To ensure that the federal requirements are met, the department includes the Buy America special provision in virtually all let contracts. Field staff need to review the contract documents to see if the Buy America provision is included.

Note: The term, "Buy America" is not to be confused with the term "Buy American". Buy American is the Federal Acquisition Regulation (FAR) requirement for US Government Agencies to purchase only American made products. This law does not apply to WisDOT contracts.

The Buy America special provision requires the contractor to use steel and iron products manufactured in the United States. It applies to manufacturing processes from smelting through the coating. Foreign sources of scrap and pig iron are acceptable sources of raw material as long as the melting of those materials is domestic. A small amount of foreign steel and iron is allowed if its value, as delivered to the project, does not exceed one-tenth of one percent of the total contract cost or \$2,500, whichever is greater. A copy of the current Buy America provision is on-line at:

<http://wisconsindot.gov/hcciDocs/contracting-info/buy-america-provision.pdf>

The following items are examples that contain materials covered by the Buy America requirements.

- Anchor Assemblies, Bolts, and Rods (for structures and bases)
- Bearing Pads
- Bridge Secondary Fabricated Items:
  - Rail Posts, Sleeves, Shims, Rail Panels, Structural Fasteners, Expansion Devices, Cover Plates, Floor Drains, Guardrail Anchors, Bearing Assemblies, Steel Diaphragms
- Castings (including inlet & manhole covers)
- Bar Steel (coated & uncoated)
- Tie Bars
- Dowel Bars
- Hook Bolts
- Concrete Culverts, Pipes, Endwalls, Catch Basins, Inlets, Manholes (steel reinforcement)
- Pre-stressed Concrete Members (steel reinforcement)
- Metal Pipes & Endwalls
- Delineator Posts & Hardware
- Drains & Downspouts
- Pull Boxes, Poles, Mast Arms, Metallic Conduit
- Fencing Fabric, Rails, Tension Wire, Barbed Wire
- High Strength Bolts
- Steel Piling
- Sign Bridges & Supports
- Steel Sign Posts
- Steel Grid Floor
- Steel Plate Beam Guard
- Structural Steel
- Stud Shear Connectors

***FHWA waiver guidance dated 12/21/2012 has been cancelled.***

The FHWA also has a "Buy America Questions & Answers" page available online at:

<http://www.fhwa.dot.gov/map21/qandas/qabuyamerica.cfm>

Documentation/certification is needed for each of the following steps in the steel and iron production process when the Buy America provisions apply:

1. Location steel/iron was melted/cast.

2. Location steel/iron was rolled/drawn.
3. Location steel/iron was fabricated.
4. Location steel/iron was coated/galvanized.

Note: Items 1 and 2 are commonly done at the same location for structural steel. Not all of these steps apply to all steel products.

Field staff need to ensure Buy America requirements are met as follows:

1. The contractor reviews the contract and determines the steel and iron products covered under Buy America.
2. The engineer reviews the Materials Acceptance and Testing Guide in [CMM 8-50](#) and the project-specific E-Guide to ensure compliance with contract requirements. Steel and iron items are flagged with a US Flag symbol in the upper right hand corner of the E-Guide.
3. Before incorporating steel and iron products for structures in the work, the contractor needs to furnish a Fabricator's Certificate of Compliance, Manufacturer's Certified Report of Test or Analysis, or Shop Inspector's Report as applicable. The engineer should not accept steel and iron components without this documentation.
4. Before accepting steel and iron products the engineer will review the documentation submitted under item 3 above, Mill Test Reports, and the material itself to determine its origin. Bar steel reinforcement markings can be compared with a listing of markings currently available in each region to identify the origin of manufacture.

Shop inspection reports for structural steel and iron items processed by the Bureau of Structures should state that the steel and iron complies with Buy America.

Steel and iron products accepted on the project by a Certificate of Compliance or Certified Report of Test or Analysis as the sole or supplementary documentation will be acceptable if the documents indicate the steel and iron was manufactured in the United States. Some mills state on their documents that the steel and iron represented complies with Buy America. This is also satisfactory.

For those items not requiring either a Certificate of Compliance or a Certified Report of Test, it will be necessary to obtain from the manufacturer, through the contractor, a statement that the steel and iron was manufactured in the United States.

Shop inspection reports and other reports for steel and iron items, processed by organizational units other than the Quality Management Section, should state that the represented products comply with Buy America.

The contractor needs to provide the engineer all information that may have a bearing on a products origin of manufacture before it is accepted and/or incorporated into the work. A simple certified statement from the contractor is not sufficient evidence.

5. The contractor needs to maintain a running total of the cost of steel and iron products not meeting the Buy America criteria already incorporated into the contract work. Cost determination is based on invoice costs or going rates for items without invoices. The engineer needs to make sure the contractor does not exceed the Buy America threshold for foreign and/or undocumented steel and iron products or a project may lose all or part of its federal funding.
6. After completing the work the contractor must complete form WS4567 and submit to the engineer for inclusion in the project records. WS4567 is found at:

<http://wisconsindot.gov/hcciDocs/contracting-info/ws4567.doc>

Utilities must submit form [DT2249](#) Utilities Certificate of Compliance for Steel and Iron Items.

## 2-28.6 Contractor Debarment or Suspension

Causes for contractor debarment include the following:

1. Conviction of or a civil judgment for:
  - Fraud or a criminal offense in connection with an agreement or transaction.
  - Violation of a Federal or State antitrust statute.
  - Embezzlement, theft, forgery, bribery, falsification or destruction of records, false statements, receiving stolen property, false claims, obstruction of justice.
  - Any offense that shows a lack of business integrity or honesty that seriously and directly affects the individual's responsibility.
2. Violation of terms of a public agreement or transaction.
3. Doing business with a debarred, suspended, or ineligible person.
4. Failure to pay certain substantial outstanding debts.
5. Violation of a voluntary exclusion agreement.

Fraud, collusion, and false statements are of particular concern to construction industry. Each of these violations is discussed below.

## **2-28.7 Fraud**

Fraud is a generic term that embraces all the ways one person can falsely represent something to another in order to induce that person to surrender something of value. A contractor who knowingly provides the government with commodities or services that do not meet contract specifications has committed fraud in performance.

### **2-28.7.1 Minority/Woman/Small Business Fronts**

A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. DBE fraud can be used as a vehicle to commit other crimes such as money laundering, tax evasion, and wage frauds. DBE fraud can be done several ways, including false fronts, pass-throughs, personal net worth misrepresentation, illegal check cashers, and false eligibility.

Potential indicators of DBE fraud include the following:

- DBE owner/employees not on-site.
- Flipping of employees from prime's payroll to the DBE payroll.
- No additional equipment added to site when DBE starts their portion of work.
- No commercially useful function.
- Dual party checks.
- No expertise in the work to be performed, licenses, or equipment.
- Job is too large for the DBE – check work history.
- Lease agreements between prime and DBE contractors.
- Prime contractor always using same DBE.
- DBE business owned by relative of prime contractor.
- Ghost employees or certified payroll irregularities.
- Brokering agreements.

### **2-28.7.2 Accounting Frauds**

#### **2-28.7.2.1 False Progress Payments**

The price of the contract is fixed; the government pays the same amount upon the ultimate completion of the project regardless of the amounts of the individual progress payments. A contractor gains the time value of having the money in hand, and places the government at risk for its failure to perform, by inflating or front-loading claims for progress payments.

#### **2-28.7.2.2 Cost Mischarging for Materials and Labor**

This involves consistent cost overruns on highway construction projects because of intentional under-estimating or bidding by the contractor in order to receive the contract. As a result, the cost overruns substantially exceed the original project estimates or highest bidder. The following examples could be an indicator of accounting fraud:

- Truck weight tickets showing loads of materials that exceed the capacity of the truck, production output of the plant amount needed for the particular job site, etc.
- Truck tickets that are handwritten or have missing information, such as initials of highway inspector, job site, and codes and temperature of materials, etc.
- Production plant records with altered, modified, or missing information such as job sites, loading times, and codes and temperature of materials, etc.
- Any manual entries or adjustments to electronic payroll records.

#### **2-28.7.2.3 Product Substitution**

The contractor may knowingly or unknowingly be supplying sub-standard materials to the project. The following are examples of illegal product substitution:

- Fabrication of inspection reports.
- Rigging of product tests.
- Mislabeling or mismarking of products and materials.



- Purchase of low-grade basic material.
- Use of false financial reports.
- Use of foreign suppliers for products and materials.
- Incomplete contractor files with no originals or copies of originals, such as, delivery records and certifications showing the source, specifications, and laboratory tests of products and materials.
- Unsigned certifications or certifications with forged or different signatures of authorized technical personnel from the contractor, subcontractor, suppliers, etc.
- Backdated, modified, altered, or falsified documents or certifications.

### **2-28.8 Collusion**

Collusion by definition is an illegal, secret agreement between two or more parties for a fraudulent or wrongful purpose. It is an agreement to do something illegal and one party furthers the agreement by action.

Collusion can take the form of market division, price rigging, bribery, and specification manipulation. Market division is when competitors allocate certain customers, products, or territories amongst themselves (X can sell to Y, as long as they don't sell to Z). Bribery is the corruption of the relationship between the government and its agents or the exploitation of one's official position for personal gain.

#### **2-28.8.1 Price Rigging/Bid Rigging**

The Sherman Act enacted in 1980, prohibits any agreement among competitors to fix prices, rig bids, or engage in other anticompetitive activity. The Antitrust Division will prosecute these violations.

Price rigging is an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold. This does not mean that competitors agree to charge the same price. And not all competitors have to be amongst the conspiracy.

Bid rigging occurs when conspiring competitors agree in advance as to who will win the bid for a contract, with the contract being let through the normal competitive bidding process.

There are 5 types of bid rigging:

1. Bid suppression. This is when one or more contractors, who typically would be expected to bid, agree to refrain from bidding or withdraw a previously submitted bid so that another contractor's bid will be accepted.
2. Complementary bidding. This is a form of bidding, where similar to bid suppression there is a predetermined winning contractor, but in this case, the competing contractors submit bids that are too high or where they violate special terms of the contract.
3. Bid rotation. All conspirators take turns being the winning bidder. The terms of the rotation may vary depending on agreement.
4. Subcontracting. This occurs when one party gets awarded a contract, then awards subcontracts to the conspiracy members in exchange for not submitting a winning bid.
5. Geographic. Repeated awarding of contracts to the same contractors in a particular geographical area.

Examples of bid rigging include the following:

- Establishing or adhering to price discounts.
- Holding prices firm.
- Eliminating or reducing discounts.
- Adopting a standard formula for computing prices.
- Maintaining a certain price differential between different types, sizes, or quantities of products.
- Adhering to a minimum fee or price schedule.
- Fixing credit terms.
- Not advertising prices.

#### **2-28.8.2 Conflict of Interest**

A conflict of interest occurs if consultants, architects, engineers, etc., who were hired by the government to develop contract specifications are affiliated with or later subcontract with the contractor receiving the contract. Specifications by government engineers or hired consultants, architects, engineers, etc., that appear to favor the services and materials of certain contractors, subcontractors, suppliers, or sole sources may be an indicator of collusion. Possible conflict of interest violations are listed below.

- The disclosure by government officials or personnel of confidential information, such as bids, to contractors,

engineers, etc., during any phase of the contract award process.

- Government officials or personnel or their family members having financial interest in the contractor or subcontractor who was awarded the contract.
- Government officials or personnel seeking employment for themselves or their family members with the contractor or subcontractor who was awarded the contract.
- Government officials or personnel assisting the contractor or subcontractor with preparing the bid, or leasing or renting any equipment to them for performing the contract.

### **2-28.8.3 Detecting Collusion**

#### **2-28.8.3.1 Administration**

There are several administrative techniques to use to prevent or detect collusion.

- Use of computer systems.
- Strengthening of estimating techniques.
- Engineer estimate should remain confidential.
- States should continue to find improved methods of cost estimation.
- Bidders list must be confidential on project-by-project basis.
- Bid depositories must be located on State property.
- Department should continue to encourage competitive bidding and more responsive bids by having pre-bid meetings, increasing the number of pre-qualified bidders, and structuring the contracts properly.
- Ensure staff is trained in bid rigging.

#### **2-28.8.3.2 Suspicious bidding patterns**

- The same competitor always wins the contract, especially when there are the same competitors placing bids.
- The same competitors submit bids and they seem to take turns winning.
- Some bids are unnecessarily higher.
- Fewer than normal number of competitive bids.
- A company appears to bid substantially higher on some bids than others, with no apparent reason.
- Bid prices drop when a new or infrequent bidder submits a bid.
- Successful bidder subcontracts work to competitors that submitted unsuccessful bids.
- A company withdraws its successful bid and subsequently is subcontracted by the winning bidder.

#### **2-28.8.3.3 Suspicious pricing patterns**

- Identical prices may indicate a price-fixing conspiracy, when prices stay identical for long periods of time, prices previously were different, or price increases do not appear to be relative to increased costs.
- When discounts are eliminated, especially when they historically have been given.
- Vendors charge higher prices to local customers than to distant customers.

#### **2-28.8.3.4 Suspicious statements or behaviors**

- Irregularities in bids indicate that both parties combined efforts on bids.
- Bid documents contain last minute price alterations.
- One person submits bid for two parties.
- Submitting a bid when they are incapable of performing the contract.
- A company brings multiple bids to an opening and submits a particular bid based on whom else is submitting bids.
- A bidder, or person, makes a suspicious statement indicating some acknowledgement of a conspiracy.

### **2-28.9 False Claims**

A false claim is any statement within the jurisdiction of government that contains any false, fictitious, or fraudulent representation. False claims include any documents or certifications with altered, backdated, modified, or missing information concerning the contractor's bond and pre-qualifications, minority or women owned business status, financial history, previous debarment and suspension, ownership of equipment and facilities, performance on other jobs, etc., for the purpose of obtaining the contract.

False claims also result from the use of multiple mailing addresses, post office boxes, or unusual mailing addresses on documents and certifications from the contractor, subcontractor, suppliers, etc. False documents

can be contracts, subcontracts, invoices, certified payrolls, union submissions, tax returns, W-2's, accounting ledgers, checks, etc.

An anti-fraud statute originating from the federal-aid Road Act of 1916 (18 U.S.C. 1020, 23 CFR 633, 23 CFR 635.119) specifically provides that "willful falsification, distortion, or misrepresentation with respect to any facts related to the project is a violation of the federal law" and requires that the false statement poster, Form FHWA-1022, must be posted on the project.

<http://www.fhwa.dot.gov/programadmin/contracts/fhwa1022.cfm>

The False Claims Act (31 U.S.C. 3729(a)) today is an extremely powerful civil enforcement tool, and allows the government to recover funds fraudulently obtained from federal programs. It penalizes the offender by imposing financial penalties and can be punitive. It also serves a strong deterrent to other would-be defrauders.

The four most commonly invoked provisions are:

Any person who:

1. Knowingly presents, or causes to be presented, to an officer or employee of the US government a false or fraudulent claim for payment or approval.
2. Knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government.
3. Any person who conspires to defraud the government by getting a false or fraudulent claim allowed or paid.
4. Knowingly makes, uses, or causes to be made or used, a false statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the government.

A person knowingly submits a false claim if he or she:

- Knows the information contained in the claim is false; or
- Acts in deliberate ignorance of the truth; or
- Acts in reckless disregard of the truth or falsity of the information.

Examples of false claims:

- Prevailing wages.
- False certification of compliance with enumerated standards.
- Falsifying construction inspection and testing credentials.
- False invoices or vouchers.
- Claims based on false contractor's interpretations.
- Buy America violations.
- Subcontractor claims.
- Claims for contract adjustments.
- Falsified schedules/delay analysis.
- Inflated progress billings.
- Double billings.
- Substitutions of materials with inferior products.
- False credit in change orders.

## **2-28.10 What To Do If Fraud, Collusion, or False Claims Are Suspected**

1. Take each complaint or allegation very seriously.
2. Call police immediately if a life threatening situation or other reason to do such is warranted.
3. Gather preliminary information in-house. Confer with DOT counsel on the information gathered.
4. Decide with General Counsel if complainants may have criminal liability. Decide who should be contacted (police, FBI, OIG, IRS, State Tax Investigator, etc.).
5. Notify FHWA if Federal Funds are involved.
6. Appoint an investigator or provide information from a third party investigator (try to get cooperation and share info with the third party investigator if one exists).
7. Take Statements. Gather evidence (promise limited confidentiality if necessary).



8. Do a report.
9. Based on findings, take remedial action (i.e. notice of suspension or debarment – Trans 504).
10. Complete due process, including hearings, settlements, suspension, and debarment.

Interview persons in position of responsibility. Make copies of all relevant documents. Do not alert employees to suspicions. Contact the Office of the Inspector General.

Call the OIG National Fraud Coordinator in Washington, D.C. at (202) 366-0681 or a Regional Fraud Coordinator at (312) 353-0106 for more information or to report fraud involving federally funded highway projects and other related transportation programs. Callers can remain anonymous and all information is confidential. You are key to protecting government integrity by reporting fraud, waste, and abuse.

#### **2-28.10.1 Resources**

- Part 29 -- Government-wide Debarment and Suspension and Government-wide Requirements for Drug-free Workplace:  
<http://www.fhwa.dot.gov/hep/guidance/superseded/49cfr29.cfm>
- The federal government System for Award Management web page:  
<https://www.sam.gov/portal/SAM/#1://www.epls.gov/>
- The United States Department of Justice web page:  
<http://www.usdoj.gov/>
- FHWA Resources - Legislation, Regulations and Guidance:  
<http://www.fhwa.dot.gov/legsregs/directives/notices.htm>